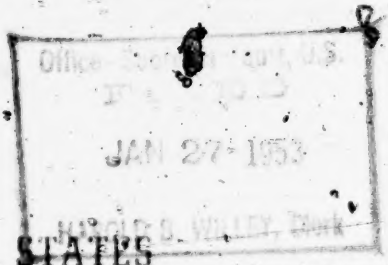

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

vs.

WILLIAM DEUPREE, JR., ANCILLIARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

Statement of the Case

Katherine Wing, a resident of the State of New York, was killed on June 19, 1948, while a passenger in a motorboat owned and operated by petitioner Louis Levinson, which collided with a motorboat owned and operated by petitioner Mitchell A. Hall. The collision occurred on the Ohio River, a navigable stream, and within the jurisdiction of the United States District Court for the Eastern District of Kentucky, which district includes the county of Campbell and the adjacent county of Kenton. 28 U. S. C. 97. The death resulted from the negligent, wilful and malicious acts of both petitioners in operating their boats at an ex-

cessive rate of speed without giving proper signals and by reason of other improper conduct.

On October 22, 1948, Rose Wing, the decedent's mother, qualified as domicilary administratrix of her daughter's estate in New York. On December 7, 1948, respondent qualified as ancillary administrator of the estate of the decedent in the County Court of Kenton County, Kentucky, by taking the oath and executing bond as required by law. On the same day he filed his libel against petitioners, alleging himself to be the regular, qualified and acting ancillary administrator of the estate of Katherine Wing, deceased, setting forth the foregoing facts and seeking damages for the wrongful death of his decedent (R. 1). The action was not based upon diversity of citizenship, and could not have been so based since all the parties thereto were residents of the State of Kentucky, but was founded upon the admiralty jurisdiction of the United States court which admittedly extends to torts committed upon the Ohio River, and it is not controverted that an action for wrongful death under the Kentucky statute may be maintained in such court under such circumstances.

On March 3, 1949, each of the petitioners filed an answer denying the appointments of the New York administratrix and the ancillary administrator but not affirmatively alleging any invalidity or defect in these appointments. (R. 4, 6). On July 7, 1949, petitioners having applied to the court to take depositions, respondent filed a motion for leave to sue *in forma pauperis*, stating that "decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given" (R. 8, 9).

Immediately, upon the same date, petitioners demurred to the libel, claiming that the quoted words indicated that the Kenton County Court had no jurisdiction to appoint

respondent as ancillary administrator (R. 9, 1[illegible]). Reading the quoted language into the libel and construing it to mean that decedent was possessed of no assets whatever, the District Court sustained the demurrers and granted respondent leave to amend (R. 15, 16).

On July 29, 1949, an amended libel was filed which was identical with the original libel save that, in addition to alleging respondent's appointment in Kenton County, it likewise alleged his appointment as ancillary administrator by the Campbell County Court on July 28, 1949 (R. 12). Petitioners again demurred, contending that the Kenton County appointment was void, that the Campbell County appointment could not sustain the action because made after the running of the one-year statute of limitations and could not, under Kentucky law, relate back to the commencement of the suit (R. 16, 17). The court adhered to this view and, upon respondent's declining to plead further, dismissed the amended libel (R. 21).

The United States Court of Appeals for the Sixth Circuit, on December 22, 1950, reversed the judgment and remanded the case for further proceedings in accordance with its opinion, rendered without dissent and reported in 186 F. (2d) 297 (R. 24-34). Petition for a writ of certiorari was then filed by petitioners in this court, which petition was denied April 23, 1951, *Levinson et al.* v. *Deupree, etc.*, 341 U.S. 915.

Upon remand to the District Court the demurrers were overruled in accordance with the mandate of the Court of Appeals and, upon issue being joined, the case was tried, resulting in a decree for respondent in the sum of $30,000.00 and costs against both petitioners (R. 63) who then appealed to the Court of Appeals for the Sixth Circuit. The grounds for said appeal (R. 64, 65) were identical with those previously passed upon by the Court of Appeals and

urged upon this Court in the former petition for certiorari. Petitioners claimed simply that the prior decision of the Court of Appeals and the rulings of the District Court made in obedience thereto were erroneous. Since no new issue was raised, respondent filed no brief and moved for summary affirmance of the trial court's decree. The Court of Appeals affirmed "upon the authority of *Deupress* v. *Levinson et al.*, 186 Fed. 2nd, 297, C.C.A. 6". *Levinson et al.* v. *Deupree*, 199 F. (2d) 760 (R. 71). This court granted certiorari on December 15, 1952.

Summary of Argument

Respondent submits that the decision of the Court of Appeals was correct not only for the reasons stated in its well considered opinion but for others, equally cogent, as well. For one thing, petitioners' entire argument is based upon the contention that decedent's estate was possessed of "no" assets in Kenton County, Kentucky, and that the County Court of that county therefore had no "jurisdiction" to appoint respondent as ancillary administrator. This is an unsubstantial argument without real substance which is not supported by the record. Furthermore, even if it be assumed that there were no such assets, the Kentucky cases, despite the dictum of the Court of Appeals to the contrary, would not have had the effect of denying relief to the respondent, the supposed parallel between them and the case at bar being illusory. Correctly interpreted, the Kentucky decisions did not require the sustaining of petitioners' demurrers, but, even if this were not so, the sustaining of them was erroneous under federal procedure. The Court of Appeals correctly indicated that such would have been the case even if the litigation had arisen under the diversity jurisdiction. Since admiralty jurisdiction, not diversity, is in fact involved, the uniform procedural

requirements of the federal courts must apply, and the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and its offspring, *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945), can have no relevance. A contrary decision would not only be opposed to long established principles laid down by this court but would sever the very roots of the admiralty practice. For example, if state procedural rules were to govern, trial by jury would be required where the right has never before been recognized and the procedure provided by Congress to limit liability would be unavailable; nor would respondent, under such a holding, have been permitted to proceed *in forma pauperis*, a right granted him by federal law.

ARGUMENT

This Appeal Is a Resort to Flimsy Technicalities in an Effort to Defeat Justice

Petitioners make no argument to this court, and made no argument to the Court of Appeals, on the merits of this case. They have never claimed in either court that they were not negligent or not responsible for the death of the decedent, for the benefit of whose indigent parents the decree below was entered; nor have they asserted that that decree was excessive or contrary to the evidence. The only claim made is that respondent was improperly appointed as ancillary administrator by the County Court of Kenton County.

There is no question that under Kentucky law an ancillary administrator can be appointed to prosecute an action for wrongful death either in the county where the fatal injury occurred or in the county where assets of the decedent can be found. In this case the appointment could have been made in Campbell County since it was alleged

that the collision which caused the decedent's death occurred on the Ohio River in Campbell County. Respondent claims that the appointment could also be made, and was properly made, in Kenton County, since the right of action for wrongful death was itself an asset which was enforceable throughout the district in which it occurred and therefore supported an appointment in any county in that district, Kenton County being the county in which the federal court sat. Furthermore, respondent claims that a lack of Kenton County assets to support the appointment does not appear upon the face of the record, petitioners having offered no proof in that regard, and that a lack of jurisdiction in the County Court cannot be presumed.

The entire argument of petitioners is founded on the contention that since no assets of decedent existed in Kenton County, the County Court there was without "jurisdiction" to appoint an ancillary administrator. If technicalities are to control this case, respondent must point out that the libel showed no such lack of assets, and petitioners filed answers thereto. The demurrers were filed later, after the respondent's affidavit for leave to sue *in forma pauperis* had been filed (R. 8), and it is solely upon a statement therein that the claim of no assets is made, said statement being that "decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given." The affidavit did not show that there were no assets in Kenton County at the time of respondent's appointment, and petitioners offered no evidence to that effect at the trial. A one dollar debt to decedent would have supported the appointment, and lack of jurisdiction on the part of the County Court cannot be assumed. *Louisville Trust Co.* v. *L. & N. R. R. Co.*, 43 S. W. 698, 102 Ky. 480 (1897). *Walter's Administratrix* v. *Kentucky Traction Co.*, 266 S. W. 887, 206 Ky. 100 (1924).

Without an affirmative showing in the record that decedent possessed no asset in Kenton County at the time she was killed, the entire argument of petitioners collapses.

Furthermore, even if there had been no other assets to support the grant of letters of ancillary administration in Kenton County, the claim for wrongful death was itself such an asset. The Court of Appeals recognized (R. 27) that the claim was such an asset in Campbell County, but in fact it was such in any county, including Kenton, within the same federal district where it was enforceable. A claim "enforceable within the jurisdiction" is sufficient to furnish a basis for administration. 23 Corpus Juris 1013. Likewise a cause of action for wrongful death suffices for a grant of letters "where the cause of action arose or where it may be enforced, even though the decedent was a nonresident and left no other assets in the jurisdiction." 23 Corpus Juris 1009. 33 C. J. S. 894. In connection with the wrongful death statute the Kentucky Court of Appeals in *Austin's Adm'r.* v. *Pittsburgh, C. C. & St. L. Ry. Co.*, 122 Ky. 304, 91 S. W. 742 (1906), said at page 743:

> "Construing these sections, it has been held that where a nonresident has been killed in this state by the tort of another, administration will be granted upon his estate in this state, even for the tort, because the statute which gives the right of action to the estate of such decedent for such death, ex necessitate rei, confers jurisdiction by implication, to appoint an administrator to prosecute the suit. Brown's Adm'r. *v.* Louisville & Nashville R. R. Co., 97 Ky. 228, 30 S. W. 639."

It is important to note here that by this decision of the Kentucky Court of Appeals the right of action and the right to ancillary letters are both engendered in the same statute, the latter following as a corollary of the former, as

the court described it, "*ex necessitate rei.*" The authority to grant ancillary letters does not therefore arise from the probate and administrative statutes. Since the right of action supported a grant of letters where enforceable and since it was enforceable throughout the federal district which embraces both Kenton and Campbell Counties, either county could appoint respondent as ancillary administrator. See *Matheson* v. *United States*, 227 U. S. 540, 542 (1913). Although there is no Kentucky law directly in point on this question, the Kentucky decisions referred to by petitioners are not apposite to this case and cover situations quite different from that at bar.

Petitioners, having filed answers, and having sat back and failed to object to respondent's capacity as a Kenton County administrator until the expiration of the Kentucky one year statute of limitations, then made their attack upon respondent's qualifications. To obviate any question in connection with his capacity, respondent then applied for appointment as ancillary administrator in Campbell County, which concededly had jurisdiction since it was opposite Campbell County that the collision occurred. Not satisfied with questioning respondent's original appointment, petitioners then moved the County Court of Campbell County, Kentucky, to set aside respondent's appointment made by that court on the ground that respondent "*qualified in the Kenton County Court as administrator of the estate of said decedent and that said William Deupree, Jr., is now acting in such capacity as administrator of said estate pursuant to order of said Kenton County Court*" (see Appendix I to this brief).

That motion was filed and such representation made to the Campbell County Court following the original decision of the United States District Court sustaining petitioners' demurrers and while the appeal from the dismissal of the

action was pending in the Court of Appeals for the Sixth Circuit (see Appendix II). To the federal courts petitioners declared that the Kenton County appointment was void *while at the same time to the Campbell County Court they stated that the Kenton County appointment was valid and that respondent was acting as a Kenton County administrator.* Trifles light as air of this variety should not be permitted to deprive the penniless parents of the girl killed as the result of the acts of the petitioners from obtaining compensation for her death. The federal courts do not exist for the purpose of furnishing arenas for intellectual contests or exhibitions of counsel's ingenuity but rather stand to afford justice to parties having controversies therein. Petitioners' attempt to thwart that purpose should not be countenanced by this court.

The Amendment Permitted by the Court of Appeals Is Sanctioned by the Decisions of This Court and All Other Courts

The rule of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570 (1913), which the Court of Appeals found applicable to the case at bar, allowing amendment notwithstanding the statute of limitations, has been applied by the federal courts at least as far back as *Hodges* v. *Kimball*, 91 F. 845 (C. A. 4, 1899). Petitioners, indeed, do not dispute the following statement in the opinion below (R. 29):

> "It is a long established rule in the federal courts that administrators are permitted to secure and perfect ancillary administration in states where the decedents were non-residents, even after the running of the statute of limitations. A lack of letters of administration may be cured or an objection of want of capacity to sue may be avoided by substitution of the proper party at any time before hearing, and later appointments of this nature relate back and validate

the proceedings from the beginning. The leading case to this effect is *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570. There plaintiff, as sole beneficiary, brought an action provided for under state law. After the statute of limitations had run, the petition was amended to set up a federal cause of action and was filed by plaintiff both individually and as administratrix. The Supreme Court pointed out that, aside from the capacity in which plaintiff brought the action, there was no substantial difference between the original and the amended petitions, and held that the action was not barred. Here, too, the amendment in no way changes the issues, and in no way prejudices the appellees. Also in the instant case there is no change in the party bringing the action, but simply an amendment as to his capacity. The liberality of amendment in the federal courts goes even farther than this, allowing an actual change in the party plaintiff. *Lema* v. *Baltimore & Ohio Rd. Co.*, 128 Fed. 191; *Quaker City Cab Co.* v. *Fixter*, 4 Fed. (2d) 327 (C. A. 3); *Quin* v. *Kansas City Southern Ry. Co.*, 8 Fed. Supp. 78; *Jacobs* v. *Pennsylvania Rd. Co.* 31 Fed. Supp. 595; *Van Doren* v. *Pennsylvania Rd. Co.* 93 Fed. 260 (C. A. 3)."

The court noted (R. 33) that amendments are similarly allowed in admiralty cases.

Amendment is permitted even when the substantive law to be applied is that of one of the few states which would not allow amendment in somewhat similar situations in its own courts. *Mexican Central Railway Co.* v. *Duthrie*, 189 U. S. 76, 78 (1903). *Montgomery Ward & Co.* v. *Callahan*, 127 F. (2d) 32 (C. A. 10, 1942), allowed an amendment changing plaintiff's capacity in a diversity case after the running of the statute of limitations, saying:

"The right to recover is substantive and is therefore controlled by the law of Kansas. Erie R. Co. v. Tompkins, supra. How appellee was required to proceed, in

whose name the action must be filed, is procedural and therefore determined by the law of the forum."

As dictum the court then added, "But even if the law of Kansas is applied, the result is the same." In a more recent case the same court allowed an amendment under the federal civil rules, bringing in new parties, although "the rule in the state courts of Kansas is different." *Gas Service Co.* v. *Hunt*, 183 F. (2d) 417, 419 (C. A. 10, 1950).

But the precise amendment allowed in this case by the Court of Appeals has never, to respondent's knowledge, been denied by any court. As applied to the facts at bar, the "federal rule" is the universal rule. Petitioners cannot point to a single case in Kentucky or anywhere else wherein an improperly qualified personal representative seeking damages for wrongful death has been forbidden to amend his pleading, irrespective of the statute of limitations, to show his subsequent proper appointment. The Supreme Court of Ohio, in *Douglas Adm'x.* v. *Daniels Bros. Coal Co.*, 135 Ohio St. 641, 22 N. E. (2d) 195, 123 A. L. R. 761 (1939), succinctly stated the rule in its first syllabus (which is the law of the case in Ohio):

> "Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix *after the expiration of the statute of limitation applicable to such action, the amended petition will relate back* to the date of the filing of the petition, and *the action will be deemed commenced within the time limited by statute.*" (Emphasis added.)

As recently as December 17, 1952, the Ohio court quoted the foregoing syllabus in *Kyes, Adm'r.* v. *Pennsylvania Rd.*

Co., 158 Ohio St. 362, —— N. E. (2d) ——, wherein it allowed substitution, after the running of the statute of limitations, of an entirely different personal representative for the original ancillary administrator whose capacity had been challenged. The wrongful death statute, said the court, "is procedural and remedial in its nature, and in conformity with the general rule it should be construed liberally." 158 Ohio St. at page 365.

There is no Kentucky case contrary to the rule of the *Douglas* case, which is the rule of the *Wulf* case and of countless other federal decisions, a number of which are mentioned in the opinion of the Court of Appeals (R. 29, 30). The *Wulf* case is, in fact, followed by the Kentucky Court of Appeals. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Goode*, 163 Ky. 60, 173 S. W. 329 (1915).

The Kentucky Cases Relied upon by Petitioners Do Not Sustain Their Position

Petitioners fasten their hopes to the claim that the amendment permitted by the Court of Appeals would not have been allowed if the case had been tried in the state courts of Kentucky and that the state rule should be applied in the present proceeding under *Guaranty Trust Co.* v. *York*, *supra*. Before discussion of the applicability or non applicability of the *Guaranty Trust* case to the case at bar, the Kentucky cases upon which petitioners rely should be analyzed. It is claimed that *Jewel Tea Co.* v. *Walker's Adm'r.*, 290 Ky. 328, 161 S. W. (2d) 66 (1942), and *Vassill's Admr.* v. *Scarsella*, 292 Ky. 153, 166 S. W. (2d) 64 (1942), would be fatal to respondent's recovery in a state court of Kentucky. In fact, however neither case deals with a situation like the present one.

The *Jewel Tea* case is very far from being, as petitioners

assert (Brief, p. 23), "an exact parallel of the case at bar." It was concerned not with the law applicable to a nonresident or to a right of action in the federal courts but simply with the aplication of the Kentucky administration statutes to the estates of *resident* decedents. These statutes, as hereinabove noted, do not furnish the ground for appointment of an ancillary administrator seeking to prosecute a wrongful death action. Such ground exists under the death statute "*ex necessitate rei.*" In the *Jewel Tea* case the fatal accident occurred in Muhlenburg County, Kentucky; the administrator resided in Webster County, Kentucky, and was appointed in that county upon a petition for letters which *falsely* alleged that the decedent had resided there at the time of his death *whereas, in fact, he had never resided in Kentucky.* No administrator was ever appointed in Muhlenburg County, where the death occurred, and no attempt was made to amend the pleadings, so that the question of relation back was not presented, nor was there any question of limitations involved. Moreover, the plaintiff admitted that his appointment was void (claiming defendant had waived objection to the defect), and the remarks of the Kentucky court relative to the "void" appointment should be considered in the light of such admission. Less than three months after the *Jewel Tea* case the same court held that, where a person was granted letters of administration upon her false allegation that she was the widow of the decedent, such appointment was *voidable only* and the *acts performed by her while acting under such appointment were valid. Louisville & N. R. Co.* v. *Turner*, 290 Ky. 602, 162 S. W. (2d) 219 (1942). Finally, the *Jewel Tea* case did not decide that in an action for wrongful death of a nonresident of Kentucky the petition for ancillary administration must and can be filed only in the county where the death or injury occurred.

The alleged parallel of the *Vassill* case with the case at bar (Petitioners' Brief, p. 24) is likewise nonexistent. The case holds that where an out-of-state administrator of a nonresident who was killed in Kentucky brought suit *without qualifying there,* an ancillary administrator appointed in the county where the death occurred could not become a plaintiff more than one year after the date of death. There was no appointment whatever in Kentucky before the period of limitations expired, "void," "voidable," or otherwise. No action was brought within one year by any Kentucky administrator or any person purporting to act under color of a Kentucky appointment so that no discussion of a "void" appointment was involved. The court did, however rely on its earlier decision in *Fentzka's Adm'r.* v. *Warwick Const. Co.,* 162 Ky. 580, 172 S. W. 1060 (1915), a case in which a "void" appointment was later construed as *voidable* by the Court of Appeals for the Sixth Circuit in *Salyer* v. *Consolidation Coal Company,* 246 Fed. 794 (C. A. 6, 1918), cert. den. 246 U. S. 669 (1918).

In the very recent decision of *Cozine* v. *Bonnick,* —— Ky. ——; 245 S. W. (2d) 935, (1952), the Kentucky Court of Appeals had occasion to refer to the *Vassill* case; and to the construction placed upon its doctrine by the Court of Appeals for the Sixth Circuit, in a case where suit was brought on behalf of a minor by a next friend who was not a resident of Kentucky, and after the running of the statute of limitations, amendment was sought to allow the former minor, who had by then attained majority, to prosecute the action. The court held that a next friend must be a resident but that the trial court erred in forbidding the substituted plaintiff to proceed notwithstanding the statute of limitations. Of the *Vassill* case the court said, at page 937 of 245 S. W. (2d):

> "The appellee supports the trial court's ruling that the effect is not retroactive principally upon Vassill's

Adm'r. v. Scarsella, 292 Ky. 153, 166 S. W. 2d 64. That was a suit for damages filed by a foreign administrator for the wrongful death of a non-resident. The circuit court ruled that he was without legal authority to maintain the action and that the filing of it was without legal effect. A domestic, ancillary, personal representative was thereafter appointed by a Kentucky county court. She tendered an amended petition which adopted the allegations of the petition and asked that she be made party plaintiff and permitted to prosecute the action. The court did not allow the amendment because more than a year had elapsed since the cause of action arose, and it was therefore barred by the statute of limitations. We affirmed. Other cases to the same effect are cited. The doctrine that a suit instituted by a disqualified personal representative is in effect no suit at all and may not be amended by a properly qualified representative was questioned in Salyer *v.* Consolidation Coal Co., 6 Cir. 246 F. 794, a case transferred to the federal court because of diversity of citizenship. Other cases of this court were pointed to as holding such an original appointment to be merely voidable, so that there could be a substitution. However, the court followed federal procedure and held the substituted qualified administrator could prosecute the case as having been filed before the section was barred. We need not go into that particular question here for there is a material difference between a suit by a personal representative of a deceased person and a suit by an infant by or through a next friend."

The Kentucky court thus failed either to agree or disagree with the construction placed on its former decisions relating to "void" appointments by the Court of Appeals for the Sixth Circuit.

The *Cozine* case, which allowed relation back of an amended petition to a petition filed by a next friend who was not qualified under Kentucky law, may be distinguishable from the case at bar, but respondent submits that the

situation there presented is much closer to that now before this court (if it be assumed that respondent's appointment in Kenton County was irregular) than were the circumstances in the *Vassill* case wherein no pleading was ever filed, within the period of limitations, by anyone either qualified or purporting to be qualified under Kentucky law.

Neither of the Kentucky cases relied upon by petitioners touches the question at bar. Neither adds anything to the *Fentzka* case, which the Court of Appeals distinguished in the *Salyer* case. Neither can be cited as opposing the rule enunciated by the Ohio court in the *Douglas* case upon facts identical with those at bar, and neither is contrary to the established federal rule as applied to a case like that now before the court. Thus, even if this were a diversity case, which it was not and could not have been, and even if it be assumed that the *Guaranty Trust* case required the application of state law to the pleading of this admiralty suit, the decision of the Court of Appeals was correct.

This Case May Be Determined Purely As a Procedural Matter

In their brief (pp. 8, 12 ff.) petitioners urge at length the argument that the Kenton County Court was without "jurisdiction" to appoint respondent. This argument addresses itself toward the appointment of resident administrators to administer the assets of Kentucky decedents, rather than of ancillary administrators to prosecute wrongful death claims on behalf of the next of kin of nonresident decedents; but, in fact, no question of jurisdiction is involved in this case. All that the court need decide is the procedural question of respondent's right to amend his pleading.

It is claimed by petitioners that the District Court de-

rived its jurisdiction from the federal constitution, the Kentucky wrongful death act, "a valid order of a Kentucky court appointing administrator," and the commencement of suit by such administrator. Indubitably respondent's rights are founded upon the constitutional and statutory provisions mentioned and enforcement thereof is dependent upon a proper court action, but to state that without a valid order there would have been no jurisdiction below is confusing and incorrect. A defendant may show in defense that a plaintiff has no right to sue under his pleadings or the facts, but, as this court said in *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28 (1901), that is no defect of jurisdiction, but of title. The court further said:

> "It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in the cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction."

And in *General Investment Co.* v. *New York Central R. R. Co.*, 271 U. S. 228, 230 (1926), the court said:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits . . . Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction . . . If it be resolved against him, the

appropriate decree is a dismissal for want of merits, not for want of jurisdiction."

In *McCandless* v. *Furlaud*, 293 U. S. 67 (1934), objection was made that the trial court was without jurisdiction because the plaintiff, an ancillary receiver, had never been validly appointed as such. Rejecting this argument, this court held that the objection "goes not to the jurisdiction of the District Court in this suit, but to the legal capacity of the plaintiff as ancillary receiver." The Court's opinion also noted that federal appellate courts have refused to entertain the objection, when not made in the trial court, "that the plaintiff, an executor or administrator, had not secured ancillary administration," thus making it crystal clear that no jurisdictional question was involved. The court cited *Leahy* v. *Haworth*, 141 F. 850 (C. A. 8, 1905), which held that where a British executor filed suit as executor in a federal court in Nebraska before qualifying as such and did not so qualify until after the running of the statute of limitations, the subsequent qualification related back and avoided the bar of the statute. Numerous cases were reviewed showing that an administrator may sue as such without appointment provided that he takes out letters before trial. These decisions make it evident that there is no question of lack of jurisdiction present in the case at bar.

This supposed jurisdictional question underlies all of petitioners' "preliminary" argument (Brief, pp. 8, 9) as well as that portion of their argument which contends for the vulnerability of the original libel to demurrer (Brief, pp. 12-21). Petitioners fail to deny or recognize that the death claim itself was an asset sufficient to support the Kenton County appointment, even if there were not a nickel's worth of other assets there—the lack of which, if true, does not appear in the record. The County Court is pre-

sumed to have jurisdiction, and the assertion of lack of jurisdiction of the trial court, in any event, is contrary to the rulings of this court above mentioned.

So far as petitioners' claim of the availability to them of all defenses available in a Kentucky court, including the defense of the Kentucky statute of limitations (Brief, pp. 1, 12), is concerned, it is sufficient to state that respondent has never questioned the rule of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921), or contended for the application to the case at bar of any rule of laches or statute of limitations other than Kentucky's. It is noteworthy, however, as the Court of Appeals pointed out (R. 31, 32), that that statute (Kentucky Revised Statutes, Sec. 413.140) is not a part of the statute creating the right of action for wrongful death (Kentucky Revised Statutes, Sec. 411.130), that such a statute is procedural only, and that the Kentucky Court of Appeals has recognized that such a limitation is not to be treated as part of the right. It should also be pointed out that the wrongful death statute, a portion of which is quoted by petitioners (Brief, pp. 9, 19), not only provides that the action shall be prosecuted by the personal representative of the deceased but also directs how the proceeds shall be distributed:

> "(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:
>
> * * * * * * *
>
> "(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one moiety each, if both are living . . . " Kentucky Revised Statutes, Sec. 411.130.

It is thus apparent that, the recovery not being a part of decedent's general estate, the personal representative is

but a nominal party and that the parents of the deceased girl are the real parties in interest. In *Vaughn's Adm'r.* v. *Louisville & N. R. Co.*, 297 Ky. 309, 179 S. W. (2d) 441, 445, (1944), the Kentucky court said:

> "This action is brought under KRS 411.130 which gives a cause of action to a personal representative for the sole benefit of named beneficiaries. The recovery in an action for wrongful death is not for the benefit of the estate but for the next of kin, here the decedent's father and mother. The substance of the present action is that the surviving beneficiaries are suing, since they only are entitled to the benefit of a recovery. The statutory authority of the administrator, where the decedent leaves any of the kindred named in the statute, is to sue for the benefit of the next of kin. *The administrator is merely a nominal plaintiff. The real parties in interest are the beneficiaries whom he represents.*" (Emphasis added.)

This court, in *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445, 449 (1897), observed that a wrongful death statute is remedial "and, like all such statutes, should be so construed as to give instead of withholding the remedy intended to be provided . . . The important part of the section is that which gives a right of action, and not that part which provides who may enforce it; the latter is an *incidental* provision."

Petitioners claim (Brief, p. 21) that the amended libel showed upon its face that the cause of action was barred by the statute of limitations. That this is incorrect and that the face of the amended libel shows no such thing may be determined by this court by a reading of the pleading in question (R. 12). In this circumstance a demurrer could not be properly sustained on the ground of limitations. After a review of federal cases, it is stated in 4 *Cyclopedia of Federal Procedure*, 2d Edition, Sec. 1319, that "A fair

general conclusion to draw from all the authorities seems to be that ordinarily the defense of limitations must be interposed by an answer, unless the legal effect of the bar of limitations conclusively appears from the complaint." The recent Kentucky decisions go even further than this and hold that generally the defense of limitations cannot be raised by demurrer even when the lapse of time appears on the face of the pleading. Thus the Kentucky court in *Markwell* v. *Kahlkoff*, 258 Ky. 231, 79 S. W. (2d) 984 (1935), said:

> "Though, formerly, it was held that a demurrer should be sustained where the petition showed on its face that the action was barred, Johnson v. Robertson, 45 S. W. 523, 20 Ky. Law Rep. 135; Bradford v. Bradford, 43 S. W. 244, 19 Ky. Law Rep. 1245, it is now the settled rule that, with certain exceptions not here material, the statute must be pleaded, and the question of limitation cannot be raised by demurrer. Davies' Ex'r. v. City of Louisville, 159 Ky. 252, 166 S. W. 969; Davidson v. Kentucky Coal Lands Co., 180 Ky. 121, 201 S. W. 982; Baker v. Begley, 155 Ky. 234, 159 S. W. 691; Lyttle v. Johnson, 213 Ky. 274, 280 S. W. 1102."

Crady v. *Hubrich*, 299 Ky. 461, 185 S. W. (2d) 949, 951 (1945), states: "In this jurisdiction the defense of limitations cannot, as a general rule, be raised by demurrer but must be pleaded." The 1946 decision of *Woolery* v. *Smith*, 302 Ky. 725, 196 S. W. (2d) 115, repeats that the defense of limitations must generally be pleaded (except in actions for relief from fraud, etc.) and cites "some of the later cases holding that a limitation defense must be pled in the general run of litigation."

Nowhere in this case is there an attack upon the merits of respondent's cause of action. Complaint is made only upon the procedural question of his right to amend. That right is granted by the federal courts and not forbidden by

the law of Kentucky. The court need decide nothing else. Even if such amendment were forbidden in the state courts, however, it should nevertheless be permitted in this admiralty suit.

This Suit in Admiralty Is, and Should Be, Unaffected by State Rules Concerning Amendment and Relation Back of Pleadings

Petitioners assert (Brief, p. 7) that "This case requires the determination of the question whether admiralty courts, when invoked to enforce rights created by state law and unknown to admiralty, are bound by the law of such state, or the general maritime law." No such question is involved here. Certainly, for example, in a wrongful death suit in an admiralty court founded on a state statute, contributory negligence would defeat the libelant's cause if it were a bar under the state law. The case at bar, however, contains no such issue but involves purely a procedural matter. The real question raised by petitioners here is: Must a federal admiralty court follow state procedural rules? This court long ago answered that question in the negative, and the general principle of the supremacy of admiralty procedural law, as the original opinion below indicates, is established.

Petitioner's sole claim is that a federal admiralty court should be required to follow state decisions as to amendment and relation back of pleadings in a death case through an extension of the rule of *Erie Rd. Co.* v. *Tompkins*, supra, as applied in *Guaranty Trust Co.* v. *York*, supra. The court below pointed out, while answering this contention, that "Even in diversity cases, while the substantive right created by statute is controlled by state law (*Erie Rd. Co.* v. *Tompkins*, supra) procedural matters are governed by the law of the forum" (R. 32). The decisions of this court show that state law has not been allowed to interfere with admir-

alty procedure. The ruling below, that an amended libel changing the capacity of the nominal party libelant related back to the filing of the original libel notwithstanding the statute of limitations (which is not contained in the state death statute and hence not a limitation upon the right conferred), involves only a question of federal procedure.

In *The H. E. Willard*, 52 Fed. 387, 389 (1892), Mr. Justice Gray, sitting as Circuit Justice and citing decisions of this court, said: "The admiralty jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislature of a state. When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right, *according to their own rules of procedure.*" (Emphasis added). Thus, such courts may enforce a right of action given by a state death statute in a limitation of liability proceeding. *The Hamilton*, 207 U. S. 398 (1907). Referring to the decision in the *Erie* case, this court has said, in a case involving maritime issues arising in a state court:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all *substantive* rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245 (1942). (Emphasis added).

This court has not extended the *Erie* doctrine beyond diversity cases. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 307 (1947). See concurring opinion of Mr. Jus-

tice Jackson in *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 467 (1942). Petitioners' sole claim is that it should be extended to this admiralty case. However, a recent writer on this subject declares not only that the *Erie* doctrine has no place in admiralty but also that it should not even apply in diversity cases involving maritime issues. Stevens, *Erie R. R.* v. *Tompkins and the Uniform General Maritime Law*, 64 Harvard Law Review 246, 267 ff. (December, 1950).

The principle which petitioners would have this court overturn is one of venerable lineage. In *Laidlaw* v. *Oregon Ry. & Nav. Co.*, 81 Fed. 876 (1897), the Circuit Court of Appeals for the Ninth Circuit held that whether an intervenor in an admiralty suit, seeking compensation under state law for wrongful death, had asserted his claim within the time allowed by the state statute of limitations was to be determined according to admiralty procedure and that a state statute providing that an action is deemed commenced when summons is served or issued to the sheriff for service "is a mere statutory provision respecting the remedy, and that, too, it would seem, in actions at law. It is inapplicable to the procedure of admiralty courts." The court quoted from Justice Story's opinion in *The Chusan*, Fed. Cas. No. 2,717 (1843), where, in discussing the exercise of admiralty and maritime jurisdiction, he says: "The states have no right to prescribe the rules by which the courts of the United States shall act, or the jurisprudence which they shall administer."

This court, in *Steamboat Company* v. *Chase*, 16 Wall. 522, 534 (1872), while holding that a remedy under a state statute for wrongful death upon the navigable waters of a state might be sought in the state courts, in a federal court under the diversity jurisdiction, or in a federal ad-

miralty court, used this pertinent language in contrasting the common law jurisdiction with that of admiralty:

> "Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he must conform to the system of pleading and to the rules of practice, and of evidence, which prevail in the chosen forum. State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the Circuit Courts as well as in the State courts, but the rules of pleading, practice, and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court. State legislatures may regulate the practice, proceedings, and rules of evidence in their own courts, and those rules, under the 34th section of the Judiciary Act, become, in suits at common law, the rules of decision, where they apply, in the Circuit Courts."

The Conformity Act (former 28 U. S. C. 724) expressly excluded admiralty causes from its requirement that state practice be followed in civil actions in the federal courts. A leading authority on this branch of the law has written: "In an action in admiralty under a State statute creating a right of action for death by wrongful act, the same principles of decision are applied as would be applicable in a common law action, but matters of pleading, practice and evidence are governed by the rules and decisions in admiralty." 1 *Benedict on Admiralty*, 6th ed., sec. 148. Thus although state law and decisions control the right of action and limitations thereon in such a suit, the procedure is that of an admiralty court where the issues and question of damages are not submitted to a jury. (See *State of Maryland to the Use of Szczesek* v. *Hamburg-American Steam Packet Co.*, 190 F. 240 (1911), affirmed *sub nom. Atlantic Transport Co. of West Virginia* v. *State of Maryland to*

the Use of Szczesek, 193 F. 1019 (1912), affirmed 234 U. S. 63 (1914).

Guaranty Trust Co. v. *York*, supra, upon which petitioners fasten their hopes, has no applicability to the case at bar. The court in that case held simply that a federal diversity court in an equity suit must apply a state statute of limitations. The opinion there recognized that even before *Erie R. Co.* v. *Tompkins*, supra, federal courts had been deemed bound by such state statutes in common law cases and generally applied them in equity cases. Likewise this court had held that they were bound by state limitations in admiralty cases founded upon state wrongful death statutes. *Western Fuel Company* v. *Garcia*, supra. But it has never been suggested that established rules relating to amendment and relation back of pleadings in such cases are subject to the dictates of the state courts, and nothing in *Guaranty Trust Co.* v. *York* is susceptible of such interpretation. That case contains a ruling on the question of a limitation of a state-created right when federal jurisdiction is invoked by reason of diversity of citizenship. The rules of pleading and procedure under the admiralty jurisdiction clearly are unaffected by that decision and by the rule of its parent, the *Erie* case. It is not difficult to understand the surprise evident in the remarks of a District Court in 1947, six days after this court's decision in *United States* v. *Standard Oil Co.*, supra, that "this is the very first time I have ever heard it even asserted that the Erie Railroad Co. case has the slightest bearing on suits in admiralty." *Central American Shipping & Trading Corp.*, v. *Mercantile Ship Repair Co.*, 73 F. Supp. 779, 780 (D. C. E. D. N. Y.). Certainly it should have no such bearing with respect to procedural matters. Such would appear to be the implication of the language above quoted from *Garrett* v. *Moore-McCormack Co.* It is

perhaps worthy of mention that *Bochantin* v. *Inland Waterways Corp.*, (D. C. E. D. Mo. 1950) 9 F. R. D. 592, discussed in the original opinion of the Court of Appeals below (R. 34) and which was squarely on the point here in question, subsequently resulted in judgment for the libelant, 96 F. Supp. 234 (1951), and dismissal of an appeal. *Inland Waterways Corporation* v. *Bochantin*, 191 F. (2d) 734 (C. A. 8, 1951).

Petitioners would have the court disregard the *Wulf* case, which dealt with a matter of pleading similar to that at bar, and apply the *Guaranty Trust* case, which held a state statute of limitations applicable to an equity suit (a proposition with which respondent has no quarrel), for they say (Brief, p. 31), "If this Court is to follow *Wulf* it cannot follow *Guaranty Trust Co.* So far as these decisions apply to the case at bar they are irreconcilable and a choice must be made between them."

There would seem to be considerable doubt whether there is any conflict between the *Wulf* and *Guaranty Trust* cases even in diversity situations. One wonders with respect to the relevancy of the *Guaranty Trust* decision to the present controversy even if the case at bar were not in admiralty. The effect of petitioners' contentions is that federal courts in adjudicating state created rights must always and in all respects apply state rules. Certainly that is not the law. All defenses, say petitioners, that were available to them in a state court were likewise available in the federal court. But difference in procedure can lead to different results even in diversity cases. To mention but one example: a party can obtain a verdict upon concurrence of nine jurors in a state court but not in a federal court. Is state law to be applied to that situation? If not, why is it to be applied to rules governing the amendment of pleadings? It should not be forgotten

that this whole question has arisen because of an application to proceed *in forma pauperis* under a federal statute.

Perhaps it is worth mentioning that although the *Guaranty Trust case* has never been deemed applicable to an admiralty case, the *Wulf* case has been applied by admiralty courts to cases under state death statutes. *Weldon* v. *United States*, 65 F. (2d) 748 (C. A. 1, 1933). *Bochantin* v. *Inland Waterways Corp.*, supra.

Steamboat Company v. *Chase*, supra, is still the law. Nor is there any reason why the hitherto prevailing rule should be changed or why the doctrine of the *Erie* or *Guaranty Trust* cases should be applied to this admiralty suit when such application would defeat, not serve, the justice which the admiralty courts strive to attain. The reasons for applying *Erie* do not obtain in the admiralty courts where procedural rules must be uniform. The case quoted by petitioners in an attempt to prove the contrary, *Just* v. *Chambers*, 312 U. S. 383 (1941), is very far from sustaining such a contention. The court there held that, just as an admiralty court would enforce a state wrongful death statute for a tort committed upon the navigable waters of a state, so also would it enforce the provisions of a state survival statute in such a case. The case, however, was brought as a limitation of liability proceeding under an Act of Congress, and its procedure was thus governed by uniform federal rules. To hold that state procedure is to be paramount in cases wherein the substantive rights are governed by local law would be to draw into question the possibility of instituting limitation of liability proceedings.

"Admiralty procedure," as the Court of Appeals pointed out (R. 32), "does not conform to the laws of the various states, but is uniform throughout the country; the practice

or procedure is extremely liberal and the rules governing such practice are even less technical than those of equity." The destruction of this uniformity in the name of state dominion would jeopardize or destroy some of the distinguishing aspects of the admiralty courts, which have their own rules of procedure and methods of appeal, including trial by the court or a master rather than by jury, and other characteristic features. It has not heretofore been suggested that this be done, and it ought not to be done now: the admiralty procedure should not be "one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port." *Workman* v. *New York*, 179 U. S. 552, 558 (1900).

Conclusion

There is no jurisdictional question in this case. Suit was duly commenced by respondent as ancillary administrator duly qualified with every color of right. At most he was a nominal party with no interest in the damages, being merely a vehicle to allow recovery by the real parties in interest, the parents of the girl whose life was snuffed out. A reversal of the judgment of the Court of Appeals would not only permit the petitioners entirely to escape the consequences of their tortious acts but would also be contrary to hitherto well settled rules of law. The petitioners were in court before the expiration of the period of limitations. Whether the ancillary appointment should have been made in Kenton County or Campbell County was a highly technical question without effect on the substantial rights of either the real libelants or the petitioners; it had no effect upon the cause of action, of which the limitations statute formed no part. Indeed, when respondent was appointed in Campbell County, petitioners sought to set aside that appointment on the ground that respondent had "qualified"

as administrator in Kenton County and was "acting in such capacity."

The amendment permitted by the Court of Appeals merely changed the capacity of respondent as nominal libelant. Such amendments are uniformly allowed in wrongful death cases by the federal courts in accordance with their liberal and enlightened policy of deciding cases upon the substantial merits and of not allowing form to triumph at the expense of substance. The state courts, too, overwhelmingly permit similar amendments, and no Kentucky case takes a contrary position as applied to the facts at bar.

The record does not show a complete lack of assets in Kenton County. Even if it did, the claim for wrongful death itself would suffice to support the appointment there, and, in any event, respondent acted with color of right in filing the suit. Under Kentucky law, his acts performed while so acting were valid. The amendment of respondent's pleading was not forbidden by any Kentucky case. However, even if it were forbidden in a state court, Kentucky rules of pleading do not control the right to amend in this case, which is governed by the uniform procedural rules of admiralty as administered by the federal courts.

The statute of limitations is designed to prevent injustice by the barring of stale claims, not to foster it by the denial of rights upon technical defenses. In *New York Central and Hudson River Railroad Co.* v. *Kinney*, 260 U. S. 340, 346 (1922), this court in a decision founded upon the *Wulf* case (opinion of the court by Mr. Justice Holmes) said:

> ". . . when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist,

and we are of opinion that a liberal rule should be applied."

The judgment should be affirmed.

Respectfully submitted,

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APPENDIX I

CAMPBELL COUNTY COURT

IN THE MATTER OF ESTATE OF KATHERINE WING, also known as KITTY WING, INTESTATE

Motion

Louis Levinson and Mitchell A. Hall move for an order setting aside and holding for naught the order heretofore entered herein on July 28, 1949, appointing William Deupree, Jr., as administrator of the estate of the above named decedent and in support hereof represent to the Court that prior to said date and on December 7, 1948, said William Deupree, Jr., qualified in the Kenton County Court as administrator of the estate of said decedent and that said William Deupree, Jr., is now acting in such capacity as administrator of said estate pursuant to orders of said Kenton County Court.

(S.) CHAS. E. LESTER, JR.
for LESTER & RIEDINGER
Attorneys for Louis Levinson and Mitchell A. Hall

APPENDIX II

CAMPBELL COUNTY COURT

IN THE MATTER OF ESTATE OF KATHERINE WING, also known as KITTY WING, INTESTATE

Notice

William Deupree, Jr., Administrator of the Estate of Katherine Wing, also known as Kitty Wing, deceased, is hereby notified that Louis Levinson and Mitchell A. Hall have filed their motion in the Campbell County Court for an order setting aside and holding for naught the order of

July 28, 1949, appointing said William Deupree, Jr. as such administrator and that said motion will be for hearing before said Court on Tuesday, the 17th day of January, 1950, at 2:30 o'clock P. M.

This notice dated at Newport, Kentucky, this the 10th day of January, 1950.

CHAS E. LESTER, JR.,
for LESTER & RIEDINGER,
Attorneys for Movants.

(6045)